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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 894

TOFFENETTI RESTAURANT COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the petitioner herein, by its attorneys Teitelbaum & Teitelbaum, and petitions this Honorable Court for a rehearing of its Petition for a Writ of Certiorari which was denied by this Court on April 22, 1963.

The reasons for rehearing of its petition are based upon facts which would in all justice and equity require that this Honorable Tribunal be apprised in order to grant the Petition for the Writ.

Petitioner herein made a motion in this Court returnable on the May 6, 1963 setting forth facts which

revealed gross misstatements made by the Respondent in its brief to this Court and which served to becloud the issues. The Clerk of this Honorable Court felt that these facts should be set forth in a Reply brief but at no time did Petitioner consent to the withdrawal of its motion which was made pursuant to Rule 35 of this Court and which would in the normal course of events require an answer and explanation from the Respondent. The Clerk without consent from Petitioner herein returned the motion papers.

The inconsistent and misleading statements set forth by the Respondent in its brief strike at the very heart of the question of the Petitioner's discrimination and would serve to prejudice this Court to believe so in the affirmative, and are set forth herein as follows:

1. On page 9 the Respondent sets forth, in substance, that money was forfeited by the Unit employees and reallocated to the remaining "non-union" participants in the employer's profit sharing plan. This statement is not factual and no such finding was made by the Board. The remaining participants were and still are both union and non-union employees including members of Local 89. It is obvious that the word non-union was added to lend support to a finding of anti-union animus and discrimination which did not and could not exist. [See tally of votes of three separate units; B. A. 15 footnote; R. A. 29a-30a.]

2. On page 12 the Respondent sets forth, in substance, that union membership "alone" determined eligibility to participate in the amended profit sharing plan. The Respondent fails to add that the amendment provides for elimination of union members only when they

are provided for and protected by a collective bargaining contract under the terms of which the employer undertakes to contribute to a union pension or union welfare plan on their behalf. [R. A. 50a; B. A. 42; 261.] Mainly the remaining participants were and still are union and non-union employees.

3. To confuse the issues reference is made on page 12 to ineligible employees being paid out less favorably than non-union employees discharged without fault. This analogy is confusing inasmuch as there was no finding made by the Board that an agreement was entered into between the parties to pay Unit employees as though they were discharged without fault. (Complete elimination of a job constitutes a discharge without fault.) The Respondent also fails to apprise this Honorable Court that union and non-union employees who are discharged without fault are treated alike. (See General Counsel's Exhibit 14 and case of Unit employee Anne Cullen, whose previous job was eliminated.)

4. With respect to the statement on page 9 of the Respondent's brief "that employees with less than five years participation received nothing" what the Respondent failed to reveal to this Honorable Court is the fact that more than half of the Unit employees who received nothing were employees who were not even participants in the profit-sharing plan because they were not in Petitioner's employ for two years prior to the then current fiscal year of August 1, 1960, as required by the qualification provision of the plan for all employees, union or non union. [B. A. 231-232.]

5. On page 13 appears the statement, in substance, that the remedy merely serves to place the parties in the

same position they were in before the amendment was made. This is not so. The agreement between the parties as found by the Board is that the employer would contribute to the union pension fund and "in consideration therefore" the employer would eliminate unit employees from the profit sharing plan and would promptly distribute to them "subject to Treasury approval" their vested interests. [B. A. 33; R. A. 14a.] There was no finding that elimination or distribution was subject to Union approval. There was no finding that Unit employees would receive their vested interests after Treasury Department approval of distribution as appears in substance on page 4 of Respondent's Brief. The agreement, as found by the Board made distribution "subject to Treasury approval." To place the parties in a *status quo* position would require the return of all distribution payments into the profit sharing fund as requested by counsel at the March 17, 1961 meeting [R. A. 23a] and this was refused. It would also require the return of all contributions made by the employer to the union pension fund. The forfeited money may not be sufficient to absorb the losses that may be sustained by the profit sharing plan as provided for in Article VI, Section 3, of the profit sharing plan. [B. A. 240.]

6. The Respondent states on page 8 that Mr. Toffenetti agreed to furnish a copy of the profit sharing plan at the conference of March 17, 1961. There is no such finding. The finding is that he agreed to "have a copy at the conference" [B. A. 37] and he did so. Although the union had a comprehensive description of the plan in its possession I offered to permit a stenog-

rapher to copy the pertinent provisions of the plan. [R. A. 23a.] A copy of the entire plan was not necessary for unit employees who were no longer covered by it as testified to by union's secretary. [B. A. 97.] It appears to be significant that the contract did not provide for the furnishing of a copy of the plan or amendments and that since the signing of the agreement on October 14, 1960 until after the distribution of the checks (a period of 5 months) there was no request for a copy of the profit sharing plan and no request for a copy of the amendment although the union was actually informed of the pending amendment. [R. A. 34a.]

7. Respondent's reference on page 11 of the motive for withholding the bonus from Unit employees merely serves to vary the terms of the written collective bargaining contract. This finding is not substantiated by any evidence. [R. A. 14a; 16a; B. A. 70; 101.] The Respondent's statement is also an attempt to lead the Court to believe that bonuses were paid only to non-union employees whereas in reality they were paid to union and non-union employees outside the scope of Local 1 Unit.

In the humble opinion of Counsel, if the order of the Board and the decision of the lower Court is not reversed then a contract can no longer be considered sacred. The Board in its attempt to remedy purported unfair labor practices went so far that it indeed deprives the employer of life, liberty and property without due process of law. If Congress intended that the Board be given the power, under section 10(a) of the Act, to modify a contract and a profit-sharing trust agreement, as is argued by Respondent, in substance, on pages 13-14 of its brief, then the National Labor Relations Act should

be declared unconstitutional in that it is police-power legislation. It is too undefinite, inadequate and uncertain for the purpose of protecting the rights of the people. Counsel further contends that the trial examiner erred in striking paragraph "ninth" of the Answer to the Complaint (page 51 of Petitioner's brief for this Writ).

It is humbly urged, because of the foregoing, that this petition for rehearing of Petition for Writ of Certiorori should be granted and the Petition for the Writ granted.

April 25, 1963.

Respectfully submitted,

TEITELBAUM & TEITELBAUM,
Counsel for Petitioner.